Attachment 6e

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Hand Delivered

April 10, 1998

Chairman Daniel Pennington
California Integrated Waste Management Board
8800 Cal Center Drive
Sacramento, CA 95826

Re: Redwood Landfill, Marin County

Dear Chairman Pennington:

On behalf of Redwood Landfill, Inc., ("Redwood"), I am writing to you in your capacity as Chairman of the California Integrated Waste Management Board ("CIWMB" or "Waste Board"). As you know, Marin County Environmental Health Services acts as the Local Enforcement Agency ("LEA") for the CIWMB. On March 30, 1998, I wrote to you to appeal the failure of the LEA to allow hearing panel review of the LEA's March 10, 1998, instruction to Redwood that it "discontinue the use of sludge derived alternative daily cover." (See Pub. Resources Code, § 45030, subd. (a) (authorizes appeal to CIWMB of inaction by LEA hearing panel).)

Since sending you my letter of March 30th, I have received a copy of the March 31, 1998, letter to you from Patrick Faulkner, County Counsel of Marin County, in which he requests that the Waste Board deny Redwood's request for an appeal. This letter responds to legal arguments made by Mr. Faulkner, and reiterates our request for an appeal. I am aware that Chief Counsel Kathryn Tobias is preparing to advise your Board on the legal issues raised by Mr. Faulkner and myself, and I am providing her with a copy of this letter and its attachments.

As a number of Waste Board Staffpersons know, the LEA and Redwood have recently had a series of professional disagreements regarding, among other things, the scope of the LEA's authority to regulate odor in areas of landfill operations unrelated to composting. Most recently, the LEA, after conceding that AB 1220 (Stats. 1993, ch. 656) eliminated its prior regulatory authority over air quality issues, has shifted its attention from the air quality aspects of the

drying of sludge to Redwood's continuing use of sludge-derived alternative daily cover ("ADC"). The LEA's March 10, 1998, instruction to Redwood to discontinue the use of sludge-derived ADC is a matter of great concern to Redwood. Such an instruction, if valid, would have immediate and significant consequences for Redwood, both financially and operationally.

Redwood's current request for appeal to the CIWMB, however, also has a significance beyond those direct impacts on Redwood. By seeking to avoid administrative review of its recent actions, the LEA has staked out a legal position that, if upheld by your Board, would deny the regulated community the opportunity for administrative review in situations where such review would provide potential means for efficient problem-solving, would be consistent with traditional concepts of due process, and would provide an alternative to litigation. An unstated corollary of the LEA's position is that, lacking the chance for administrative review, Redwood's only recourse is to judicial review -- a prospect that we want to avoid, of course, if possible. Because of the important policy implications of our request for appeal, I am taking this opportunity to write to you and your legal staff to explain at length the legal basis for our position.

Redwood's appeal raises the following substantive questions:

> first, whether, as the LEA maintains, Public Resources Code section 44307 provides a facility operator with the opportunity for LEA hearing panel review, and thus CIWMB appellate review, only for grievances strictly related to "inappropriate" permit conditions and formal "enforcement actions";
>
> second, whether instead, as Redwood maintains, a larger universe of LEA actions are subject to review under that statute, based on statutory language stating that, in addition to providing hearing panel review for such decisions, an LEA "shall also hold a hearing upon a petition to the enforcement agency requesting the enforcement agency to review an alleged failure of the agency to act as required by law or regulation"; and
>
> third, whether, regardless of the answers to these first two questions, Redwood is entitled to hearing panel review, and ultimately Waste Board appellate review, of the Marin County LEA's decision to revoke, without notice or other due process, its prior written authorization to allow Redwood to use sludge-derived ADC, despite the facts that (i) Redwood has faithfully complied with all of the conditions imposed on that approval, (ii) Redwood has spent substantial sums of money in reliance on the LEA's approval, and (iii) the LEA's reasons for revoking its approval are unrelated to any of these conditions, and in fact have nothing to do with any immediate concerns related to public health, safety, or the environment.

For reasons explained in detail below, Redwood believes that section 44307 permits hearing panel and CIWMB review of the LEA's recent actions because (i) the statute cannot fairly be read to limit such review to situations involving challenges to permit conditions and "enforcement actions," (ii) Redwood is plausibly alleging that the LEA's action is "an alleged failure . . . to act as required by law or regulation," and (iii) in any event, the LEA's action does constitute an "enforcement action" within the meaning of applicable statutes and regulations.

ANALYSIS

THE WASTE BOARD SHOULD CONCLUDE THAT IT HAS THE STATUTORY AUTHORITY AND OBLIGATION TO HEAR REDWOOD'S APPEAL, OR, ALTERNATIVELY, TO REMAND THE MATTER TO THE LEA HEARING PANEL.

A. Summary of Argument

I understand that, before scheduling a hearing on our appeal, the Waste Board first intends to make an initial decision regarding whether Redwood's grievance is of a kind subject to the right of appeal under Public Resources Code section 45030. That initial decision will necessarily turn on the question of whether Redwood had a right to seek, as it did, LEA hearing panel review under section 44307. The CIWMB and its Staff therefore will have to carefully review the latter statute, which provides as follows:

> "From the date of issuance of a permit that imposes conditions that are inappropriate, as contended by the applicant, or after the taking of any enforcement action pursuant to Part 5 (commencing with Section 45000) by the enforcement agency, the enforcement agency shall hold a hearing, if requested to do so, by the person subject to the action, in accordance with the requirements set forth in Section 44310. The enforcement agency shall *also* hold a hearing upon a petition to the enforcement agency requesting the enforcement agency to review *an alleged failure of the agency to act as required by law or regulation.*"
>
> (Emphasis added.)

As a matter of simple statutory construction, section 44307 consists of distinct components, which operate independently. The statute provides for hearing panel review, and thus ultimate appellate review by CIWMB, for three broad categories of LEA actions or decisions. The first sentence provides for two categories of such review: one for purportedly "inappropriate" permit conditions, and the other for "the taking of any enforcement action[.]" The second sentence,

which operates independently from the first, deals with a distinct, and much broader category of LEA actions. The fact that this third category is distinct from the first two is evident from the Legislature's use of the word "also" within the second sentence. This sentence permits an aggrieved party to seek hearing panel review of any "alleged failure of the [enforcement] agency to act as required by law or regulation." Redwood sought LEA hearing panel review, and now seeks Waste Board appellate review, pursuant to this second sentence, which creates the broad third category of actions subject to hearing panel review. Alternatively, Redwood believes that the LEA action at issue could, if need be, properly be characterized as an "enforcement action" addressed by the first sentence.

County Counsel has a very narrow, and I believe unsupportable, interpretation of section 44307. His March 31, 1998, letter to you asserts that this statute does not come into play "because the LEA has not taken an enforcement action against Redwood." This statement necessarily assumes that, within the second sentence of section 44307, the words, "alleged failure of the agency to act as required by law or regulation," can only apply to "enforcement actions" (or, perhaps, to challenges to permit conditions). The problem with this interpretation is that it would treat the second sentence as mere surplusage, which adds nothing whatsoever to the first sentence. Since the first sentence, without more, clearly provides for hearing panel review of enforcement actions, Mr. Faulkner treats the second sentence as being purely redundant and, in effect, meaningless.

The LEA's argument also has troublesome public policy implications. County Counsel would concede, I am sure, that hearing panel review, with the opportunity for Waste Board appellate review, would have been appropriate if (i) Redwood had simply ignored the LEA's March 10, 1998, letter ordering Redwood to halt the use of sludge-derived ADC; (ii) Redwood had thereby passed up the opportunity to "stay" the effectiveness of the LEA's action by requesting hearing panel review (see Pub. Resources Code, § 45017, subd. (a)(1)); (iii) Redwood had continued to use sludge-derived ADC in open defiance of the LEA; and (iv) the LEA thereafter had instituted what it would consider formal "enforcement action" against Redwood.

The anomaly in County Counsel's argument is that he would deny Redwood the opportunity for administrative review simply because Redwood failed to flout the LEA's command as a means of precipitating a formal enforcement action. Consistent with my advice, Redwood has chosen to avoid defying the LEA's March 10th letter, but instead has attempted to avail itself of statutory procedures for administrative review. County Counsel would reward Redwood for such law-abiding behavior by denying the company the opportunity for administrative relief, thereby forcing Redwood either to flout the March 10th letter or to directly seek judicial review. Redwood should not be forced to make such a Hobson's choice.

County Counsel's legal position, in essence, is that by avoiding the formalities of an "enforcement action," the LEA may avoid hearing panel review and Waste Board review of

actions that Redwood believes are arbitrary, unfair, and unlawful. Redwood's position, in contrast, is that the second sentence of section 44307 provides for administrative recourse in a situation such as this one, in which an owner/operator seeks to ascertain its rights and obligations without having to flout an LEA's directive. Thus, even if we assume for the sake of argument that the LEA's action does not come within the formal definition of an "enforcement action," both hearing panel and Waste Board review are nevertheless available under the second sentence of section 44307, because Redwood can plausibly claim that the LEA's action was unlawful, and because, if acted upon by Redwood, the LEA's action would have the same practical consequence as an enforcement action: Redwood would have to halt the use of sludge-derived ADC.

B. Our Research Indicates that the Waste Board has not Previously Formally Interpreted the Second Sentence of Section 44307.

On February 18, 1998, my office made a Public Records Act request to your agency, in which we asked CIWMB staff to provide us with any documents interpreting the second sentence of section 44307. Your staff responded promptly, and on February 27, 1998, provided us with a response. After looking into the matter, Senior Legal Analyst Dona Fox sent us the only documents that she and her colleagues had determined were responsive to our request. Those documents involved a single matter, namely, the Waste Board's consideration of whether to schedule a hearing for an appeal filed by San Elijo Ranch, Inc., from a decision of the San Diego County Solid Waste Independent Hearing Panel.

In the San Elijo Ranch matter, a hearing panel *did* convene, but it decided not to take enforcement action with respect to alleged violations by the County landfill operator of its mitigation monitoring program and conditional use permit. (CIWMB, Special Board Meeting, Agenda Item #1 (June 17, 1997), at p. 3 (attached hereto as Exhibit A).) In connection with the appeal filed from that decision, CIWMB staff highlighted "areas in which the lack of procedures might affect the due process rights of the parties if the Board were to decline to hear the appeal." (Id. at p. 8.) Among other items, staff pointed out that "there are no procedures regarding . . . whether or not to hear the appeal."

Our review of the pertinent documents indicates that the appeal in the San Elijo Ranch matter was based on the second sentence of section 44307, with the alleged "failure of the agency to act as required by law or regulation" being *a failure to take enforcement action.* (CIWMB, Res. No. 97-283 (undated draft copy) (attached hereto as Exhibit B).) The LEA in that matter apparently concluded that it was empowered or required to convene a hearing panel even though the party seeking review was not complaining about either an "enforcement action" or "inappropriate" permit conditions. The Waste Board, though, apparently never determined whether to endorse or reject the LEA's reasoning on this issue. Rather, the CIWMB voted not to hear the appeal, citing, among other things, concerns that the proper forum for airing the

issues was a forthcoming closure plan process. (Transcript of Hearing before the CIWMB (June 17, 1997), pp. 30-33 (attached hereto as Exhibit C).) Unfortunately, then, the CIWMB's experience with San Elijo Ranch matter is of only limited usefulness in formulating a response in the present matter.

It appears that Redwood's appeal may provide the Waste Board with an opportunity to clarify its understanding of the meaning of the second sentence of section 44307, and to suggest the procedures for invoking that provision. If the CIWMB rejects County Counsel's interpretation, the Waste Board could either decide to hear the appeal on its merits, or remand the matter to the hearing panel with a command that it hold the proper hearing.

C. Standard Principles of Statutory Construction and Sound Public Policy Considerations Compel the Conclusion that Section 44307 Provides for Hearing Panel Review, and thus Waste Board Appellate Review, for Alleged Violations of Law by LEAs Beyond Inappropriate Permit Conditions and Formal Enforcement Actions.

In the absence of a body of CIWMB precedent defining the meaning of section 44307, that meaning should be discerned based on standard principles of statutory construction. As I will explain below, and have briefly indicated above, both these principles and sound public policy reasons lead to the conclusion that Mr. Faulkner's reading of section 44307 is unsupportable.

In interpreting statutory language, courts commence with an examination of the language of the statute itself. (In re York (1995) 9 Cal.4th 1133, 1142 [40 Cal.Rptr.2d 308]; Lennane v. Franchise Tax Bd. (1994) 9 Cal.4th 263, 268 [36 Cal.Rptr.2d 563].) "If the statute's meaning is without ambiguity, doubt, or uncertainty, the statutory language controls." (9 Cal.4th at p. 1142.) As noted above, the two sentences of section 44307 are linked by the adverb "also." It is therefore clear on the face of the statute that these two sentences set forth distinct and alternative circumstances under which "the enforcement agency shall hold a hearing."

"An interpretation which gives effect is preferred to one which makes void." (Civ. Code, § 3541; Kane v. Superior Court (Hecht) (1995) 37 Cal.App.4th 1577, 1587 [44 Cal.Rptr.2d 578].) "It is established that a court should ordinarily reject interpretations that render particular terms of a statute mere surplusage; instead the court should give every word some significance." (People v. Estrella (1995) 31 Cal.App.4th 716, 722-723 [37 Cal.Rptr.2d 383].) Thus, in interpreting section 44307, a reviewing court would strive to ascertain the meaning of each of the two sentences in a manner that gives effect to both while recognizing that their meanings are necessarily distinct. As noted earlier, County Counsel's interpretation of section 44307 would render the second sentence pure surplusage. He has made the following assertion:

> "It is the LEA's position that Redwood's request for an appeal is not ripe because the LEA has not taken *an enforcement action* against Redwood. Consequently, Redwood had *no grounds* to request a hearing panel under Public Resources Code section 44307."
>
> (Letter from Patrick K. Faulkner, County Counsel of Marin County, to Daniel Pennington, Chairman, CIWMB (March 31, 1998) (emphasis added).)

Redwood submits that, because the practical effect of the LEA's action is to command Redwood to halt an ongoing activity at its landfill, the action *does* constitute an "enforcement action" within the meaning of section 44307. Section 18011 of Title 14 of the California Code of Regulations defines "[e]nforcement action" as "including, but not [being] limited to," LEA action "to institute a proceeding to modify, suspend, or revoke a permit[.]" The LEA's March 10th letter, as later characterized by Mr. Faulkner's follow-up letter to me dated March 27, 1998, [1] ordered Redwood to halt an ongoing activity previously authorized in writing by the LEA. In doing so, the LEA purported to "revoke" its prior approval. In our view, the fact that this approval was not given through a formal "solid waste facilities permit" is not fatal to our claim that the LEA's action was an "enforcement action."

In any event, however, Redwood's entitlement to hearing panel review, and thus Waste Board appellate review, does not turn on whether the LEA's March 10th action technically qualifies as an "enforcement action." Such review is authorized by the second sentence of section 44307, which, under standard principles of statutory construction, must be given some effect, and therefore clearly authorizes review of actions beyond those addressed by the first sentence. Redwood has alleged, and continues to maintain, that the LEA has "fail[ed] . . . to act as required by law[.]" This allegation is sufficient to trigger hearing panel review and Waste Board appellate review.

Notably, the legislative history of the pertinent statutory provisions supports the "plain language" interpretation set forth above. Section 44307 became law as part of Assembly Bill No. 59, passed in the 1995-96 regular session. The final committee report and analysis that was considered by the Legislature in the vote resulting in ultimate passage of a bill is a proper source for ascertaining legislative intent. (See Southland Mechanical Constructors v. Nixen (1981) 119 Cal.App.3d 417, 428 [173 Cal.Rptr. 917] overruled on other grounds Laird v. Blacher (1992) 2 Cal.4th 606, 612 [7 Cal.Rptr.2d 550]; Honey Springs Homeowners Association v. Board of Supervisors (1984) 157 Cal.App.3d 1122, 1136, fn. 11 [203 Cal.Rptr. 886].) The Committee Report for AB 59 states that:

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[1]/ See Exhibit D attached hereto, Letter from Patrick K. Faulkner to James G. Moose, March 27, 1998 (without attached exhibits).

> "According to the author's office, this measure is intended to overhaul various permitting and enforcement provisions of the Act, and to revise and recast those provisions. The bill *strengthens various provisions of enforcement law*, gives new authority to LEA's and the board to impose administrative civil penalties of violations of the law, and *expands CIWMB appellate review of LEA's enforcement decisions*. At the same time, the bill streamlines various permitting procedures and *imparts greater due process to administrative enforcement actions*."
>
> (Concurrence in Senate Amendments, Com. Rep. for 1995 California Assembly Bill No. 59 (1995-96 Reg. Sess.) (emphasis added) (attached hereto as Exhibit E).)

Thus, the Legislature, in enacting AB 59, intended that the strengthening of "enforcement law" under the bill be accompanied by "expand[ed] CIWMB appellate review" and greater assurance of due process with respect to administrative enforcement actions. Such due process, reflected in the Waste Board's expanded appellate review, is precisely what Redwood seeks in the present appeal.

Section 44307 must be read in light of the legislative objectives revealed above. "Statutory language must be read in context, keeping in mind the nature and purpose of the enactment, and must be given such interpretation as will promote rather than defeat the objective of the law. [Citation.] In ascertaining legislative intent, not only the statutory language should be considered; we should also take into account the object of the legislation, the evils to be remedied, the legislative history, public policy and other matters helpful in discerning the intended meaning of the words used." (People v. Carron (1995) 37 Cal.App.4th 1230, 1236 [44 Cal.Rptr.2d 328] (internal quotation marks omitted).)

Once a court ascertains the intent of the Legislature, so as to effectuate the purpose of the law, a statutory "provision must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity." (DeYoung v. City of San Diego (1983) 147 Cal.App.3d 11, 18 [194 Cal.Rptr. 722].) One of the major goals of the Legislature when it enacted AB 59 -- to strengthen "enforcement law" -- has been accomplished, and is not at issue herein. The question now before the Waste Board, as raised by our appeal, is how to effectuate the *other* major goal of AB 59: to provide operators greater due process through expanded administrative review. I respectfully submit that, having received increased enforcement authority, the Waste Board and its LEAs must now take action to give real meaning to the statutory mandate for greater due process for operators. The Legislature's broad intention on this point is evident in the broad language of the second sentence in section 44307.

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Using the words of the DeYoung court, a "practical" and "wise policy" that will avoid potential "mischief" here would be to permit hearing panel review, with the possibility of Waste Board appellate review, in circumstances such as those presented by this case. The mischief to be avoided is litigation -- with its attendant costs and acrimony.

There is no doubt that Redwood has the ability to go to court to seek relief from the situation created by the LEA's action of March 10th. Public Resources Code section 45033 provides:

> "A failure to appeal to the hearing panel or the board for review, or the refusal of the local enforcement agency, a hearing panel, or the board to hear an appeal does not preclude a person from filing an action with the superior court to contest any action or inaction of the local enforcement agency or the board."

This statute, notably, does not use the term, "enforcement action," but instead permits judicial review of any "action or inaction" of an LEA. Under normal principles of statutory construction, there is legal significance in the Legislature's decision, in drafting section 45033, not to use limited terms such as "enforcement action" but instead to use broad terms such as "action or inaction." "[I]f a statute referring to one subject contains a critical word or phrase, omission of that word or phrase from a similar statute on the same subject generally shows a different legislative intent." (In re Rudy L. (1994) 29 Cal.App.4th 1007, 1011 [34 Cal.Rptr.2d 864] (internal quotation marks omitted).) "[W]hen the drafters of a statute have employed a term in one place and omitted it in another, it should not be inferred where it has been excluded." (People v. Woodhead (1987) 43 Cal.3d 1002, 1010 [239 Cal.Rptr. 656].)

Thus, as used within section 45033, the phrase "any action or inaction" clearly includes the LEA's action in the present case, no matter how the County Counsel may characterize it. Even if we assume for the sake of argument that the LEA's action is not an "enforcement action," there can be no reasonable doubt that the LEA's action is clearly subject to judicial review pursuant to section 45033.

Redwood understands that section 45033 reflects a clear legislative intent that the "exhaustion of administrative remedies" shall not be a prerequisite to court review of actions taken by an LEA. (See Cal. Code Regs., tit. 27, § 18354, Comment.) Even so, however, section 44307 should not be read to *frustrate* an operator's attempt to exhaust administrative remedies where the operator *prefers* such a step to the more draconian measure of filing a lawsuit. After all, California law generally favors the exhaustion of administrative remedies, since attempts at resolving matters short of litigation reduces burdens on the judiciary and leads to a more efficient resolution of problems. (See Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 292-293 [109 P.2d 942]; Bohn v. Watson (1954) 130 Cal.App.2d 24, 37 [278 P.2d 454]; Ward v. County of Riverside (1969) 273 Cal.App.2d 353, 358-359 [78 Cal.Rptr. 46]; Mountain View Chamber of Commerce v. City of Mountain View (1978) 77 Cal.App.3d 82, 89 [143

Cal.Rptr. 441]; Coalition for Student Action v. City of Fullerton (1984) 153 Cal.App.3d 1194, 1197-1198 [200 Cal.Rptr. 855]; California Aviation Council v. County of Amador (1988) 200 Cal.App.3d 337, 340-341 [246 Cal.Rptr. 110].)

Read together, sections 44307 and 45033 should be understood to provide operators with a choice of *either* seeking administrative relief *or* going to court instead. Under Mr. Faulkner's constrained interpretation of section 44307, however, Redwood would have no right to seek hearing panel review of the LEA's recent action, though we would have the right to seek judicial review. I submit that this result presents an anomaly given the normal preference in California law for parties to exhaust their administrative remedies prior to seeking judicial review.

If the Waste Board accepts County Counsel's view, the predictable result will be a Statewide increase in litigation between facility operators and LEAs, with the Waste Board being named as a real party in interest. Such an outcome would lead to a waste of societal resources, and would effectively increase judicial oversight of the LEAs while minimizing the CIWMB's oversight role.

In his March 31st letter, County Counsel admits that Redwood is entitled to hearing panel review at such time as the LEA takes what it considers formal "enforcement action" to halt Redwood's continuing use of sludge-derived ADC. Although, oddly, this legal position almost invites Redwood to defy the LEA's March 10th command as the sole means of gaining administrative review, Redwood prefers not to defy the LEA, and instead has chosen to act within the law by seeking administrative review as a means of staying the LEA's action while Redwood's legal arguments are considered by the hearing panel and, if need be, by the CIWMB.

By construing the second sentence of section 44307 to allow hearing panel review in this matter, the Waste Board would be acknowledging and acting upon the Legislature's express grant of statutory authority for the CIWMB to provide administrative review of LEA actions. Absent such an acknowledgement, the Waste Board will be less able to review the actions of LEAs, while court review will become more common. LEAs are merely the agents of the CIWMB. The Legislature has expressed an intent that a hearing panel convene to review an LEA's failure to act in accordance with law and regulation. The Legislature has expressed an intent that the Waste Board accept an appeal to review an LEA's failure to convene a such a hearing panel. To provide adequate due process and administrative control of LEA action, the CIWMB should be able and willing to hear appeals such as that presented by Redwood.

D. Redwood Has a Strong Appeal on the Merits.

Although I realize that the Waste Board will not hear this matter on its merits until after making the threshold determination regarding whether to hear the appeal, I thought that, for your general information, I should briefly touch on our substantive arguments within this letter. In his March

31st letter, Mr. Faulkner touched on the merits of his position. I therefore think I should quickly do the same.

In summary, Redwood maintains that, having granted Redwood conditional permission to use sludge-derived ADC pending completion of a formal solid waste facilities permit ("SWFP") revision, the LEA is estopped from arbitrarily revoking that permission in the absence of violations of the specified conditions. The LEA's action thus constitutes, to use the language of section 44307, a "failure of the agency to act as required by law or regulation."

For a party to be subject to the principle of estoppel, "[g]enerally speaking, four elements must be present . . .: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (Robinson v. Fair Employment & Housing Com. (1992) 2 Cal.4th 226, 244-245 [5 Cal.Rptr.2d 782] (citations and internal quotation marks omitted); Ovadia v. Abdullah (1994) 24 Cal.App.4th 1100, 1111 [29 Cal.Rptr.2d 527]; see also Monterey Sand Co. v. California (1987) 191 Cal.App.3d 169, 177-178 [236 Cal.Rptr. 315] (estoppel principle applies to governmental permit approvals); Halaco Engineering Co. v. South Central Coast Regional Commission (1986) 42 Cal.3d 52, 75-76 [227 Cal.Rptr. 667] (same).)

In the matter at hand, the LEA expressly granted approval for use of sludge-derived ADC "until such time as the SWFP is revised." (Letter from Mark Janofsky, of the LEA to Doug Diemer of Redwood (Sept. 3, 1996) (attached hereto as Exhibit F).) That approval letter belies the LEA's implicit assertion that the approval was in any way conditioned on LEA approval of a revised SWFP by any particular time. Even if the LEA had a unilateral, subjective understanding that its written approval was subject to such an unwritten condition, that fact would not justify the LEA's recent action. The above-referenced September 3, 1996, letter from Mr. Janofsky of the LEA to Mr. Diemer of Redwood detailed several time-related conditions with which Redwood was required to comply. None of them, however, related to ultimate approval of, or overall progress toward, a completed SWFP revision. Because the LEA could have, but did not, include such a condition within its written authorization for Redwood to use sludge-derived ADC, the LEA cannot now claim that it adequately apprised Redwood of the existence of such an unstated condition. The LEA's present instruction to "discontinue" use of sludge-derived ADC constitutes, at best, an attempt to retroactively apply a new condition supplementing those expressed in its September 3, 1996, approval.

While it seems unmistakable that the LEA could have made ongoing ADC approval contingent upon achievement of some objective milestone by a particular date, the LEA chose another course. Perhaps the LEA could have even reserved discretion to itself by inserting some qualitative language to the effect that ongoing approval of Redwood's activity was being conditioned upon continuing satisfactory good faith progress toward SWFP approval. The LEA

did not do so, however. In the face of Redwood's substantial financial commitments in reliance upon the LEA's approval *as written*, the LEA is estopped from modifying that approval at this time, or at least is estopped from doing so arbitrarily for reasons unrelated to any immediate risk to health, safety, or the environment. The arbitrariness of the LEA's recent action is demonstrated in part by the fact that the LEA's approval for Redwood to use shredded greenwaste as ADC pending SWFP revision remains intact.

The substantive claim underlying this appeal raises questions of due process, such as the following. Under what circumstances may an LEA interject new conditions into an approval for use of ADC? Are there any limits on an LEA's ability to revoke such approval on the basis of a purportedly implied condition? May such approval be rescinded arbitrarily for no reason at all, and without notice? As mentioned earlier, the Legislature intended Assembly Bill No. 59 to "expand[] CIWMB appellate review of LEA's enforcement decisions" and "impart[] greater due process to administrative enforcement actions." The Legislature clearly wants your agency to consider such issues.

Finally, I want to respond to one particular set of allegations made by County Counsel in his March 31st letter. In that epistle, Mr. Faulkner observes that

> "[t]he demonstration projects ended sometime in August 1996. In a letter dated September 3, 1996, the LEA granted Redwood interim approval to continue using sludge-derived ADC pending application revision. The understanding was that LEA approval for use of sludge-derived ADC was only interim and that Redwood's application for revision of its solid waste facilities permit (SWFP) was imminent."

Missing from this description of events are two key facts: first, that Redwood filed an application for SWFP revision in December 1996, and has since revised and supplemented that application repeatedly in order to modify the project description to reduce identified problems, and to render the application "complete" in the eyes of the LEA; and second, that, during the entire period in question, the LEA and Redwood have together been exploring further approaches to sludge management, to be included within the revised SWFP. New information has been generated continuously since September 1996. For example, Redwood only received the LEA's "Final Report: Alternative Daily Cover Demonstration Project Utilizing Sludge Dried by the Windrow Method at Redwood Landfill" on December 15, 1997 (attached hereto as Exhibit G).

Because acceptance of a complete application by an LEA triggers certain timelines for processing the application (see, e.g., Cal. Code Regs., tit. 27, § 21650), it is not surprising that the Marin County LEA has demanded a great deal of information before accepting Redwood's application as complete. Having taken this stringent approach, however, the LEA cannot fairly complain

that a complete application, for a project description acceptable to all concerned, has not been achieved as quickly as might have been hoped. Redwood has certainly been trying hard, and working diligently, to get the permit revision process moving.

* * * * * * * *

For all of the reasons set forth above, Redwood respectfully submits that it is proper for the Waste Board to either hear Redwood's appeal on the merits or, in the alternative, to direct the LEA to convene a hearing panel to address the facts of the matter in the first instance.

Thank you for your attention.

Sincerely,

James G. Moose

cc: Kathryn Tobias
Ralph Chandler
Douglas G. Sobey
Douglas Diemer
Duane Woods
Patrick K. Faulkner

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